Florence J. Hicks d/b/a Ebon Research Systems *and* American Federation of Government Employees, Local 3430, AFL–CIO. Cases 6–CA–15463 and 6–CA–15766

April 30, 1991

SUPPLEMENTAL DECISION AND ORDER

BY CHAIRMAN STEPHENS AND MEMBERS CRACRAFT AND OVIATT

On July 29, 1988, the National Labor Relations Board issued a Decision and Order in this proceeding.[1] The Board, inter alia, affirmed with additional rationale the judge's finding that assertion of jurisdiction over the Respondent's operations was appropriate under the standard set forth in *Res-Care, Inc.,* 280 NLRB 670 (1986). The Board further found that the Respondent committed several violations of Section 8(a)(3) and (1) of the Act.

Thereafter, the Respondent filed a petition for review with the United States Court of Appeals for the District of Columbia Circuit. On July 28, 1989, the court issued its decision.[2] The court stated that the Board had ''revealed no reasoning by which to fit its extension of jurisdiction to Ebon within its *Res-Care* doctrine,'' and remanded for further Board action ''either consistent with its existing precedents or for generation of a new jurisdictional rule.''[3] The court did not address the merits of the Board's unfair labor practice findings.

By letter dated February 1, 1990, the Board accepted the court's remand and requested statements of position. The General Counsel and the Union filed statements of position. The Respondent filed a reply, including a request for an award of attorneys' fees and costs. The Respondent also filed a motion for dismissal with prejudice. The Union filed an opposition to the motion to dismiss and request for attorneys' fees and costs.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.[4]

The Board accepts the court's opinion as the law of the case. For the reasons set forth below, we reaffirm our original determination to assert jurisdiction over the Respondent under the *Res-Care* standard.

I.

The Respondent, a sole proprietorship, provides research consulting services to government agencies and other entities. It obtains most of its work through minority subcontracts with the Small Business Administration (SBA). During 1981 and 1982, the period relevant to the unfair labor practice and election objection issues in this case, the Respondent provided services in Morgantown, West Virginia, to agencies of the Federal Government under three separate contractual arrangements. All contracts were subject to the requirements of the Service Contract Act of 1965.[5] Section 351 of the Service Contract Act requires that subject contracts include provisions for minimum wage and benefit levels for service employees engaged in contract programs. These levels are set by the Secretary of Labor in accord with prevailing area standards or, ''where a collective-bargaining agreement covers any such service employees,'' in accord with the terms of that agreement.

One service contract relationship at issue here resulted from the negotiation between the Respondent and the Small Business Administration (SBA) of successive, 1-year cost-plus-fixed-fee reimbursement contracts requiring the Respondent to perform animal care and research support functions for the National Institute of Occupational Safety and Health (NIOSH) at the latter's Morgantown facility. The contracts were assigned to NIOSH for administration and payment. Another service arrangement, also negotiated between the Respondent and SBA and assigned to NIOSH, involved a fixed-price contract requiring the Respondent to provide a librarian and library aide for the NIOSH library. Finally, a cost-plus-fixed-fee reimbursement contract between the Respondent and the United States Department of Agriculture (USDA) required the Respondent to provide two laboratory technicians to assist NIOSH in performing tests on laboratory animals.

The evidentiary focus of the jurisdictional issue here has been on the animal-care contracts. In the representation proceeding, Dr. Hicks, the Respondent's executive director, described the process of negotiating these contracts with the NIOSH contracting officer. She stated that she presented the salaries she wished to pay, and the contracting officer reviewed this information to determine whether the salaries are within the wage standards set by the United States Department of Labor (DOL). If they were outside the DOL wage range, she would have had to revise them.

Dr. Hicks testified that she set fringe benefits according to company standards, but she tried to conform leave benefits with those of Federal employees at the NIOSH facility. The contracting officer would annually audit the allocation of money for the Respondent's fringe benefits. Dr. Hicks said that she could pay the Respondent's employees less than the approved fringe-benefit-cost figure, but she could not exceed that figure and get reimbursed for the additional amount.

The contracts themselves did not specify wage rates or the kinds of benefits to be paid to employees in

[1] 290 NLRB 751.

[2] *Ebon Research Systems v. NLRB,* 880 F.2d 1396 (D.C. Cir. 1989).

[3] Id. at 1399–1400.

[4] Neither Chairman Stephens nor Member Oviatt participated on the panel which issued the original decision in this case.

[5] 41 U.S.C. § 351 et seq.

covered job classifications. The 1982–1983 animal-care contract, unlike its predecessor, stated that fringe benefits would be reimbursed at the ''provisional'' rate of 23 percent of total direct labor costs. The space for a ''ceiling'' reimbursement rate was left blank. Both animal-care contracts did, however, incorporate by reference clause 3 of the former Department of Health, Education and Welfare (HEW) General Provisions for Negotiated Cost-Plus-Fixed-Fee Type Contract. Clause 3 provided that the Government is not obligated to reimburse the Respondent for costs incurred in excess of the estimated cost set forth in the ''Schedule,'' without the Government contracting officer's written approval. The ''Schedule'' apparently included labor costs set forth in the Respondent's budget proposed by it when negotiating the service contract.[6]

The animal-care contracts required the Respondent periodically to submit detailed reports and other information, including vouchers for reimbursement specifying the wage rate and amount charged for direct labor costs and indirect costs (fringe benefits and overhead). The Government contracting officer could audit these vouchers, determine that a cost is ''disallowable,'' and reduce any contract payment by the amount of the disallowed cost. There is no evidence that the contracting officer has disallowed the Respondent's cost reimbursement claims under the animal-care contracts.

General Counsel witness Robert Edgill had 10 years of experience negotiating and monitoring service contracts as a Government employee. He testified without contradiction that, pursuant to the Service Contract Act, the contracting officer ''normally'' would approve as ''allowable costs'' wage increases that arise out of a bona fide collective-bargaining agreement as long as they are reasonably encompassed by prevailing rates for comparable skills in the geographic locale. Dr. Hicks admitted that her NIOSH contracting officer told her ''that my contract always allowed collective-bargaining negotiations.''[7]

The animal-care contracts also provided a mechanism permitting midterm renegotiation. The Government contracting officer had the responsibility for negotiating with the Respondent about any changes in the contracts. The record reflects that the compensation and period of performance articles for the 1982–1983 animal-care contract were twice renegotiated, resulting in an increase in overall contract value and length. Dr. Hicks admitted that the Respondent and the contracting officer could accommodate an employee's salary increase by amending the contract.

The record contains only a small part of the USDA lab technician contract. The contract apparently did not specify wage rates for covered employees. The Respondent's NIOSH library-services contract specifically provided for the Respondent to receive fixed compensation at the rate of $7.96 for librarian hours worked and $4.98 for library-aide hours. The contract stated that these rates covered ''all expenses including report preparation, salaries, overhead, general and administrative expenses, and profit.'' The contract did not specify a wage rate or benefits for covered employees. The fixed-price library contract, unlike the animal-care cost-reimbursement contracts, did not incorporate clause 3 of HEW's general provisions.

It is undisputed that none of the service contracts expressly precluded the Respondent from increasing the wages or fringe benefits of covered employees. The Respondent's nationwide service contract operations yielded annual gross income in excess of $1 million. Dr. Hicks admitted that the contract did not bar her use of profits to increase wages or benefits. General Counsel witness Edgill testified that the Respondent could fund wage-and-benefit increases from savings in other reimbursable areas or from its fixed contractual profit. A library aide did receive a wage increase from the Respondent during the term of the fixed-fee library contract.

The Respondent has substantial daily autonomy in its control of all employees covered by the service contracts at Morgantown. The contracts dictated certain performance standards and procedures, hours of operation, and safety-and-security requirements, but the Respondent's managerial hierarchy retained ultimate control in matters of employee hiring, discipline, supervision, scheduling, and evaluation. NIOSH employees provided only technical direction of the Respondent's employees.

II.

In *National Transportation Service*, 240 NLRB 565 (1979), the Board articulated a new standard for determining whether to assert its jurisdiction over a private employing entity providing services to or for an exempt governmental entity. The Board determined that if the private entity is itself an employer within the meaning of Section 2(2) of the Act, then the Board should assert jurisdiction if this employer ''has suffi-

[6] This line-item budget was not made part of the record during the evidentiary hearings before the Regional Director and the judge. In its brief to the judge after the hearing on remand for litigation of the jurisdictional issue, and again in its brief in reply to the judge's supplemental decision, the Respondent attached copies of a description of cost elements allegedly included in the line-item budget proposal for the first animal-care contract. The document listed estimated hours, hourly wage rate, and total costs for three job classifications. It also set forth fringe benefit costs as a percentage (30 percent) of direct labor costs. The Board granted the General Counsel's motion to strike this material. 290 NLRB fn. 1. Without addressing the Board's action, however, the court of appeals has apparently accepted and relied on this material in its opinion. We therefore view its incorporation into the record as the law of the case.

[7] Dr. Hicks claimed, however, that the contracting officer questioned whether the Union, which represents Government employees and had a constitutional provision relating to the pursuit of legislative goals, could represent the Respondent's employees because the animal-care contract prohibited the expenditure of funds to influence legislation. The matter of the Union's qualifications as collective-bargaining representative is not an issue before the Board on remand from the court of appeals.

cient control over the employment conditions of its employees to enable it to bargain with a labor organization as their representative.'' Ibid.

In *Res-Care*, supra, the Board reaffirmed the basic *National Transportation* test and identified the evidentiary factors which are most significant in deciding whether a private employer does have sufficient control over its employees' employment conditions to warrant the assertion of jurisdiction. The Board emphasized the importance of examining not only the control retained by the private employer but also the ''scope and degree of control exercised by the exempt entity over the employer's labor relations . . . .'' 280 NLRB at 672. The Board held as follows:

> When an employer like Res-Care lacks the ultimate authority to determine primary terms and conditions of employment, such as wage and benefit levels, it lacks the ability to engage in the necessary ''give and take'' which is a central requirement of good-faith bargaining, and which makes bargaining meaningful.[8]

Res-Care had a cost-plus-fixed-fee reimbursement contract with the United States Department of Labor (DOL) to operate a residential Job Corps center. In bidding for the contract, Res-Care submitted a detailed proposal including a list of job classifications, a labor-grade schedule, and a salary schedule setting minimum and maximum wage rates for each labor grade. In addition, DOL asked Res-Care to submit its personnel policies, including fringe benefits. The proposed wage ranges and benefits were approved in advance by DOL and became the ''allowable cost'' basis for reimbursement. The contract specifically provided that any proposed changes in wage ranges or fringe benefits had to be submitted to DOL for approval. Based on the foregoing evidence of DOL's control over the primary employment elements of wages and benefits, as well as substantial controls over other aspects of Res-Care's personnel policies, the Board found that Res-Care did not possess sufficient labor relations control to enable it to engage in meaningful bargaining. Accordingly, the Board decided not to assert jurisdiction.

In a companion case, *Long Stretch Youth Home*, 280 NLRB 678 (1986), the Board applied the same clarified jurisdictional test as in *Res-Care* but reached a different result. Long Stretch had a contract with a State of Maryland agency to operate a juvenile residential facility. The state agency paid Long Stretch on a per-child fee basis. The state agency reviewed the contractor's employee salaries as part of the annual budget process and issued general cost guidelines suggesting minimum and maximum salary ranges for each job classification. The agency's actual involvement in setting Long Stretch employees' wages was limited, however, to rare investigation and discussion of whether the private employer was paying ''grossly unfair'' salaries. The state agency also reviewed Long Stretch benefits, but only to insure that certain types of benefits were provided, without regard to amount.

III.

On review of the Board's original decision asserting jurisdiction, a panel of the District of Columbia Circuit found the Board's jurisdictional analysis inadequate. The court focused on the animal-care contracts' incorporation by reference of clause 3 in the HEW's general provisions and on the specific compensation rates and estimated hours set forth in the Respondent's proposed budget. In the court's opinion, this

> clause . . . suggests that if Dr. Hicks agreed to a wage increase and hoped to finance it out of economies in non-wage costs, she could not do so without government approval; the government could adjust down for the savings but not up for the raises. This looks like *Res-Care*.[9]

Addressing arguments made by the Board and the Union before it, the court found that the ''most likely interpretation'' of clause 3 contradicted their challenge to Dr. Hicks' disclaimer of the ability to shift among costs without consent. The court also rejected the contention that the Respondent could use the contractual fixed-fee profit to finance increases in employee compensation. It viewed the Respondent's ability to use profits for that purpose as no different from the employer's theoretical ability to do so in *Res-Care.* It noted that the Board had expressly rejected the idea that such theoretical ability was sufficient to establish meaningful control over wages and benefits.[10] Finally, the court disagreed with the Union's argument that the Service Contract Act provided for the automatic mid-term incorporation in the Respondent's service contracts of any wage increases resulting from collective-bargaining negotiations. The court found that ''[a] far more natural reading is that the [Act] incorporates into government contracts wage provisions that at the time of contracting have already been embodied in a collective bargaining agreement and are therefore subject to scrutiny by the contracting officer.''[11]

The court acknowledged the possibility that the requisite employer flexibility and control over wages could be proved by evidence that the contracting officer will normally approve wage increases resulting from collective bargaining. The Board had made no finding on this point. Further, the court viewed *Res-Care* as turning on the exempt entity's retention of ultimate control, ''which would be true even if it were

[8] 280 NLRB at 674 (fn. omitted).

[9] 880 F.2d at 1398.

[10] See *Res-Care*, 280 NLRB at 674 fn. 21.

[11] 880 F.2d at 1399.

normally exercised to allow reimbursement for collectively bargained wage hikes.'' The court therefore concluded, ''While one can imagine a variation on *Res-Care* under which the required employer flexibility was grounded in the exempt entity's pliability, the Board has not advanced such a variation and the record contains no finding that would clearly support its application here.'' 880 F.2d at 1399.

IV.

Reviewing the jurisdictional issue in light of the court's opinion and the entire record, we note initially that this case involves a very common type of contractual relationship between the Federal Government and employers within the meaning of the Act. Over 20 years ago, the D.C. Circuit itself endorsed the Board's assertion of jurisdiction over a private employer, notwithstanding the labor relations controls exerted by the exempt entity through a cost-plus-fixed-fee reimbursement contract. The court noted that such contracts were in widespread use, and expressed the view that declining jurisdiction would ''remove this large and important group of contractors from the operation of the Act, a feat Congress hardly intended to make possible.'' *Herbert Harvey, Inc. v. NLRB*, 424 F.2d 770, 778 fn. 63 (D.C. Cir. 1969). Indeed, the express language and legislative history of the Service Contract Act underscores congressional intent to accommodate collective bargaining and the Board's assertion of jurisdiction over private employers contracting with the Federal Government.[12]

''An employer seeking to avoid the Board's exercise of jurisdiction carries the burden of showing that it is not free to set the wages, fringe benefits, and other terms and conditions of employment for its employees.''[13] Of the three service contract relationships at issue here, only the animal-care contract presents any problems with respect to the Board's assertion of jurisdiction over the Respondent's Morgantown service contract employee operations. There is no evidence about the lab technician contract indicating that the Respondent did not retain sufficient control over the primary elements of employee wages and benefits, as well as other terms and conditions of employment. The fixed-fee library contract provided for the *Respondent's* compensation at specific rates per contract-employee-hour worked, but it did not specify or limit the *employees'* wage-and-benefit compensation and it was not subject to HEW's clause 3. The Respondent, in fact, gave a wage increase to one employee covered by the library contract.

Further, provisions relative to employee fringe benefits in the animal-care contracts here differ significantly from those in the Job Corps contract at issue in *Res-Care*. In this case, SBA and/or NIOSH did not review or specify the kinds of fringe benefits that the Respondent could provide to its employees. The setting of fringe benefits was left to the Respondent, subject at most to possible disallowance of reimbursement claims by the contracting officer if overall fringe benefit costs exceeded a ''provisional'' ceiling set at a percentage of direct labor costs.[14] With respect to employee terms and conditions of employment other than wages and benefits, the Respondent retained and exercised far greater control than the private contractor in *Res-Care*.[15]

There remains for our consideration the critical question whether SBA and/or NIOSH retained such a high degree of control over the wage rates of the Respondent's employees covered by the animal-care contracts as to preclude meaningful bargaining. This control would be based on (1) evidence of the incorporation into the Government contract, through clause 3 of the HEW's general provisions, of labor-cost line items from the Respondent's contract proposal and (2) the authority of the contracting officer to disallow reimbursement of costs that vary from those in the proposal. We find that the Respondent has failed to prove that these potential wage controls would, in practice, have any significant impact on its ability to vary wages and fringe benefits as the result of collective bargaining.[16]

In *Fire Fighters*, 292 NLRB 1025 (1989), the Board followed what the *Ebon* court has characterized as a plausible ''variation on *Res-Care*,''[17] asserting jurisdiction based on the exempt entity's pliability in approving increased labor costs. In *Fire Fighters*, the exempt Federal agency required annual wage and benefit proposals from the private employer, but the agency's officials routinely accepted proposed compensation increases as ''reasonable.'' The Board found that the employer had failed to sustain its burden of showing that it was not free to set wages and benefits.

The labor-cost review process in this case involves not only annual budget proposals, as in *Fire Fighters*, but also continuing review of reimbursement claims by the contracting officer during the animal-care con-

[12] See *Dynalectron Corp.*, 286 NLRB 302 (1987).

[13] *R. W. Harmon & Sons, Inc.*, 297 NLRB 562, 563 (1990), citing *Fire Fighters*, 292 NLRB 1025, 1026 (1989).

[14] In *Community Transit Services*, 290 NLRB 1167 (1988), the Board found that an exempt entity's control of a private employer's ability to increase wages did not preclude meaningful bargaining in light of the employer's retention of control over all other economic (i.e., fringe benefits) and noneconomic bargainable subjects.

[15] See *Community Transit Services*, supra at 1169, and *NLRB v. Parents & Friends of the Specialized Living Center*, 879 F.2d 1442, 1453 (7th Cir. 1989) (observing that the Board's *Res-Care* standard continues to recognize the importance of evidence relating to control over noneconomic aspects of the private employer's labor relations).

[16] We accept as the law of this case the court's view that the Respondent's ability to finance labor costs from contractual profits or other revenues, although admitted by Dr. Hicks and corroborated by witness Edgill, does not distinguish this case from *Res-Care*.

[17] We find no need to address the validity of this characterization.

tract's terms. All the evidence indicates that proposals or claims for increased labor costs resulting from collective bargaining would be routinely accepted by the NIOSH contracting officer. Dr. Hicks admitted that the contracting officer told her that the animal-care contract allowed for collective bargaining. General Counsel witness Edgill stated without contradiction that a contracting officer would normally approve labor rates resulting from collective bargaining. The Respondent has offered no countervailing evidence of any circumstances, labor-related or otherwise, in which the contracting officer has disallowed, or would be likely to disallow, cost-reimbursement claims or refused, or would be likely to refuse, to amend the animal-care contract.[18] To the contrary, the second animal-care contract was twice renegotiated to reflect increased length of term and compensation. In the event that the contracting officer did disallow a claim and/or refuse to modify either of the animal-care contracts during their relatively short terms to permit a collectively bargained wage cost increase, the Service Contract Act would mandate recognizing the increase in the parties' next service contract. In any event, the Respondent could bargain for language in a collective-bargaining agreement to protect it from the consequences of adverse action by the contracting officer.[19]

Based on the foregoing, we find that the Respondent has failed to prove that it did not retain sufficient control over the primary economic aspects of its employees under the animal-care service contracts. In the absence of that proof, and in light of the substantial control retained by the Respondent over these employees' noneconomic terms and conditions of employment, we find that the Respondent had sufficient labor relations control, within the meaning of *Res-Care*, to enable it to engage in meaningful collective bargaining. Accordingly, we reaffirm our original Decision and Order asserting jursidiction over the Respondent.[20]

ORDER

On remand from the United States Court of Appeals for the District of Columbia Circuit, the National Labor Relations Board reaffirms its original Decision and Order asserting jurisdiction over the Respondent and finding that it has violated Section 8(a)(3) and (1) of the Act.

[18] See *Old Dominion Security*, 289 NLRB 81, 82 (1988), in which the Board noted the significance of the lack of evidence that the U.S. Navy would disallow wage or benefit increases resulting from a collective-bargaining agreement. Cf. *Southwest Ambulance of California*, 295 NLRB 125, 126 fn. 8 (1989).

[19] *Fire Fighters*, supra at 1026.

[20] The Respondent's motion to dismiss and its request for an award of attorneys' fees and cost are denied. In light of the court's remand, which was limited to the jurisdictional issue, we find it unnecessary to reexamine the merits of the unfair labor practice findings in the original Board decision.